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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ-ROGERS, JUDGE

J.P., et al.,)
)
Plaintiffs,)
)
v.) NO. 4:17-cv-05679-YGR
)
County of Alameda, et al.,)
)
Defendants.)
_____)

Oakland, California
Tuesday, February 13, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs: Law Offices of Darren J. Kessler
3060 El Cerrito Plaza, Suite 371
El Cerrito, California 94530

BY: **DARREN J. KESSLER, ESQ.**

The Scott Law Firm
1388 Sutter Street, Suite 715
San Francisco, California 94109

BY: **LIZABETH N. deVRIES, ESQ.**

For Defendant County of Alameda:

Haapala, Thompson & Abern, LLP
1939 Harrison Street, Suite 800
Oakland, California 94612

BY: **REBECCA S. WIDEN, ESQ.**

(Appearances continued on following page.)

Reported By: Leo T. Mankiewicz, CSR 5297 RMR, CRR
Official Reporter

APPEARANCES: (cont.)

For Defendant Triad Family Services:

Matheny Sears Linkert Jaime LLP
3638 American River Drive
Sacramento, California 95864
BY: **RONALD EUGENE ENABNIT, ESQ.**

For Defendant Maria Refugio Moore:

Gavin Cunningham & Hunter
1530 The Alameda, Suite 210
San Jose, California 95126
BY: **ELIZABETH GONG LANDESS, ESQ.**

Wood Smith Henning & Berman
1401 Willow Pass Road, Suite 700
Concord, California 94520
BY: **EUGENE ZINOVYEV, ESQ.**

1 Tuesday, February 13, 2018

2 2:38 p.m.

3 P R O C E E D I N G S

4 **THE CLERK:** We'll do the P. versus County of
5 Alameda. As counsel comes up, will you please hand me your
6 business cards, as you come up to the podium. And be sure you
7 state your name for the court reporter, please, before you
8 speak.

9 Calling civil action 17-5679, J.P. versus County of
10 Alameda. And counsel, please state your appearance.

11 **MR. KESSLER:** Darren Kessler appearing for the
12 plaintiff.

13 **MS. deVRIES:** Good afternoon, your Honor. Liza
14 deVries, also appearing for plaintiff.

15 **MS. WIDEN:** Good afternoon, your Honor. Rebecca
16 Widen appearing for the County defendants, County of Alameda.

17 **THE COURT:** Okay, who else do I have? There are
18 three people behind you.

19 **MR. ENABNIT:** Good afternoon, your Honor. Ronald
20 Enabnit for defendant Triad Family Services.

21 **THE COURT:** Okay.

22 **MS. LANDESS:** Good afternoon, your Honor. Elizabeth
23 Gong Landess, counsel for defendant Maria Moore.

24 **MR. ZINOVYEV:** And good afternoon, your Honor.
25 Eugene Zinovyev, also co-counsel for defendant Moore.

1 **THE COURT:** Okay. A lot of people in the courtroom.
2 Who's in the courtroom? Do you know? On the plaintiff's side?

3 **MR. KESSLER:** On the plaintiff's side is our
4 client's guardian ad litem.

5 **THE COURT:** Who is that?

6 **MR. KESSLER:** Shannon Villanueva.

7 **THE COURT:** I know. Would you raise your hand?
8 Okay.

9 **THE CLERK:** Counsel -- turn and speak into the mike.

10 **THE COURT:** You still need to speak in the mike.

11 **MR. KESSLER:** Yes, sorry about that.

12 **THE COURT:** Anybody else that you know on the
13 plaintiff's side?

14 **MS. deVRIES:** A friend who's here for support.

15 **THE COURT:** How about on the defense side, do you
16 know any of the other people in the courtroom?

17 **MS. WIDEN:** I do not.

18 **MS. LANDESS:** No, your Honor.

19 **THE COURT:** Let me first say that this -- the
20 circumstances leading to this case are tragic. There's no
21 other way to describe how horrible this could be. But what
22 I need to figure out is if you have a constitutional claim.

23 So tragedy is one thing, the Constitution is
24 another, and we need to figure that out now, because we aren't
25 going to go through litigation, years of expense, only to find

1 out that there isn't an articulated constitutional claim. So
2 I want to go through these because, as you know....

3 Let me ask you, how many 1983 cases have you
4 litigated? And who is the lead, by the way?

5 **MR. KESSLER:** I am.

6 **THE COURT:** Mr. Kessler?

7 **MR. KESSLER:** Yes, I am.

8 **THE COURT:** All right. So Ms. deVries, take the
9 middle mike, then.

10 **MS. deVRIES:** Okay.

11 **THE COURT:** Mr. Kessler, how many 1983 cases have
12 you litigated?

13 **MR. KESSLER:** Between five and ten.

14 **THE COURT:** To trial?

15 **MR. KESSLER:** Two.

16 **THE COURT:** What were the nature of the claims?

17 **MR. KESSLER:** One was a civil rights case relating
18 to the one that went to trial, related to unlawful restraint by
19 officers.

20 **THE COURT:** Yes.

21 **MR. KESSLER:** Another was relating to child --

22 **THE COURT:** So a Fourth Amendment?

23 **MR. KESSLER:** Yes.

24 **THE COURT:** Okay.

25 **MR. KESSLER:** Another was -- which I was co-counsel

1 with Ms. deVries, by the way --

2 **THE COURT:** Okay.

3 **MR. KESSLER:** -- another was a case involving the
4 expropriation of funds by the social service agency for foster
5 kids that was designated for their care but used by the County
6 for other reasons.

7 **THE COURT:** Okay.

8 **MR. KESSLER:** And it was actually certified as a
9 class action briefly, and then decertified after litigation,
10 and there, I represented multiple -- many claims in that one.
11 It was a multi-court litigation.

12 You want me to go through the rest of them?

13 **THE COURT:** I'm trying to understand how much
14 experience you have. Go ahead.

15 **MR. KESSLER:** Okay. There was another case
16 involving a -- about two years ago, involving a woman who --
17 involved her right to express an association where she was
18 arrested for the clothing she was wearing because they believed
19 she was a prostitute when, indeed, she was just walking to get
20 food for her disabled mother, and that was it. That case
21 ultimately resolved in a settlement.

22 And I --

23 **THE COURT:** Ms. deVries, how about you?

24 **MR. KESSLER:** There was another one, but she'll
25 mention that. She was happen to be in that one, as well.

1 **THE COURT:** Use the mike. How about you, how many
2 cases have you litigated, 1983?

3 **MS. deVRIES:** It could be 200, I'm not sure.

4 **THE COURT:** What were the general nature of those
5 1983 cases?

6 **MS. deVRIES:** Sure, everything from excessive force
7 to punitive restraints under Fourteenth Amendment to equal
8 protection in a variety of settings, mostly employment, but
9 also in jail society also, sometimes that got combined when
10 there was a security guard who was the plaintiff. Foster
11 children, danger creation cases, sort of ran the gamut, your
12 Honor, First Amendment retaliation.

13 **THE COURT:** So as we --

14 **MR. KESSLER:** Your Honor, may I supplement something
15 to you that might be of interest to the Court? I purposely and
16 intentionally will get counsel to join with me on claims that
17 I believe have federal civil rights actions involved, and
18 I have had over close on 35 years' experience in juvenile
19 dependency-related cases. I've had it for a hundred -- a
20 hundred-plus jury trials. I've done numerous cases. I used to
21 be a prosecutor for about five years in which I was lead
22 prosecutor and head of the Child Sexual Assault Unit. So I've
23 had --

24 **THE COURT:** Where?

25 **MR. KESSLER:** In Contra Costa County. So I've had

1 substantial litigation experience in other areas that
2 I purposely and intentionally will join with counsel that will
3 assist me with the federal civil rights arena.

4 **THE COURT:** Okay. This is not what I would call a
5 run-of-the-mill 1983 case, and that's one of the reasons why
6 I'm asking. I find Section 1983 cases to be some of the most
7 difficult cases, and we frequently have some of the worst
8 lawyers in federal court bringing these claims on behalf of
9 people who sometimes have fairly significant claims.

10 **MS. deVRIES:** I hear that.

11 **THE COURT:** But qualified immunity is a big hump, as
12 you know, and unless there is a clearly articulated
13 constitutional right, the first case that articulates that
14 right never gets any relief, because that's the way the law
15 works. If there isn't a constitutional right, then the
16 defendants couldn't have known. If they couldn't have known,
17 then they get qualified immunity.

18 **MS. deVRIES:** Unless it's so obvious they should
19 have known, as in *Hope v. Pelzer*.

20 **MR. KESSLER:** Or shocks the conscience, based on
21 behavior.

22 **THE COURT:** So I need to understand where the
23 constitutional right stems from, and at this point, I don't
24 think that the briefing adequately does it. So we're going to
25 go through this, and I may ask for supplemental briefing.

1 **MS. deVRIES:** Plaintiffs will be happy to provide
2 whatever you need, your Honor.

3 **THE COURT:** This first claim for relief against --
4 is it Maas? Is that how I say it?

5 **MS. WIDEN:** It's Maas, yes.

6 **THE COURT:** -- Maas and May, what is the case that
7 articulates the claim of a sibling for this state-created
8 danger where -- what's your case?

9 **MS. deVRIES:** Your Honor, Mr. Kessler can describe,
10 J.P. has his own claim on his own behalf, not related to
11 whatever claims M.M., the sister M.M. would have, or her estate
12 would have. We do not represent her estate, we do not
13 represent her, through -- well, her viable interest, we
14 represent her brother.

15 So I apologize for asking for clarification, your
16 Honor, but I wonder if perhaps the question is, what is the
17 case that secures a foster child case for damages while in the
18 exclusive of care and custody of the foster care system, and
19 there are several of them, starting with *Tomas* that is cited in
20 our brief, and I'll let Mr. Kessler describe for your Honor how
21 that would play out. It's under the Fourteenth Amendment.

22 **MR. KESSLER:** Your Honor, if I may, the way I see
23 it, that this case is -- there are two main areas. The first
24 area is what the Court's asking about in whether there is a
25 constitutional right for J.P. that's separate --

1 **THE COURT:** First of all, I didn't seal this
2 Complaint, right? So everyone is fine with their use of the
3 first name, correct?

4 **MS. deVRIES:** Yes, your Honor.

5 **MR. KESSLER:** Yes.

6 **THE COURT:** Okay. What I want to do is, I want to
7 go through every cause of action. I don't want generalities.
8 I cannot -- in a 1983 context, I cannot operate in
9 generalities.

10 **MR. KESSLER:** All right.

11 **THE COURT:** I have to operate in specifics.

12 **MS. deVRIES:** Very well.

13 **THE COURT:** So the first cause of action that is
14 alleged is the abridgment of civil rights. That's how you've
15 titled it, state-created danger.

16 What case am I going to go to that is going to give
17 me the answer that says that the plaintiff has this
18 constitutional right, which emanates from what constitution- --
19 what amendment? The Fourteenth?

20 **MR. KESSLER:** It's under the Fourteenth Amendment.

21 It's the right -- it's even conceded by the defendant in this
22 case in their reply brief that they have a right to be free
23 from harm in foster care; that foster children have that right
24 to do that.

25 There is also a special relationship where there is

1 a duty of the social workers to care for foster children in
2 foster homes, and that is a specific right delineated by the
3 cases we cited in *Delaney (sic) v. Winnebago* and *Carlo v.*
4 *Chino*.

5 **THE COURT:** Okay, so why doesn't *Delaney*, or -- do
6 you concede that, that the First Cause of Action survives?

7 **MS. WIDEN:** No, we do not concede that, your Honor.

8 **THE COURT:** So what is it about -- *Delaney*?

9 **MR. KESSLER:** *Deshaney*, rather, *v. Winnebago*.

10 **THE COURT:** Why doesn't that stand for the
11 proposition that the First Cause of Action survives?

12 **MS. WIDEN:** Well, two reasons, your Honor. First of
13 all, the type of claim, the type of Fourteenth Amendment claim
14 that's being asserted here, which is essentially a loss of care
15 and companionship of his sister M.M., who died in foster care,
16 that type of claim is not cognizable in the Ninth Circuit under
17 *Ward v. City of San Jose*, and the fact the claim --

18 **THE COURT:** Is that an accurate statement of the
19 first claim?

20 **MR. KESSLER:** No.

21 **THE COURT:** All right, what is the relief sought
22 under the first claim?

23 **MR. KESSLER:** The relief sought is for the harm to
24 J.P. for the harm he suffered when in the foster care
25 witnessing and experiencing the trauma related to his sister

1 being under the influence of methamphetamine twice in his
2 presence, and then dying in his care -- in his arms, and then
3 while he's watching her being revived, or being attempted to be
4 revived, and ultimately unsuccessfully.

5 So he has his own independent right to be protected
6 from such emotional trauma in that home, and that is the right
7 that we're claiming here that was violated. That is separate
8 and apart from his sister's rights, and we carefully pled it
9 accordingly.

10 **THE COURT:** Okay, based on that articulation, does
11 J.P. apply?

12 **MS. WIDEN:** No, your Honor, I believe that the *Ward*
13 case still prevents that claim. Also, if you look at the --

14 **THE COURT:** Why does *Ward* not prevent it?

15 **MR. KESSLER:** *Ward* did not involve the claims we're
16 alleging. *Ward* involved a wrongful death claim. That's not
17 what we're claiming here. We specifically do not claim that,
18 and for elaboration, I could ask my co-counsel to cite the
19 authorities to support that whole proposition, because that's
20 very clearly what we've laid out in our briefs, and I think we
21 could supplement it right here.

22 **MS. deVRIES:** And your Honor, I really appreciate
23 your careful attention to detail, because it's a very important
24 case, and the reason that we're here on this motion to dismiss
25 is because defendants' entire argument is that *Ward* precludes

1 this entire case, and that's based on a holding in the Ninth
2 Circuit that a basically wrongful death claim cannot be brought
3 by a sibling, and if we look at 1983 law, your Honor, and we
4 look at the loss of familial association under the Fourteenth
5 Amendment claim that derives, it's specific from the state law
6 wrongful death claims; of course, a sibling does not have a
7 wrongful death claim under the C.C.P.

8 Specifically in our Complaint, there is no such a
9 claim, and so what's happening here is the County would like
10 the Court to construe all of our claims as being wrongful
11 death, when they're not.

12 Instead, the First Cause of Action, which on the
13 first page of the Complaint gives you just a little cheat sheet
14 for your Honor's assistance of the eight claims, and the first
15 one is under 1983, the Fourteenth Amendment, for danger
16 creation, and that is the claim where a public entity or
17 officer or social worker puts somebody in a position where they
18 will be harmed and that would not have happened otherwise.

19 Here you have a little boy who was taken from his
20 home, and we're not questioning the initial detention and
21 taking from his birth home. However, when he was placed in the
22 care of Ms. Moore, four days later, his sister ingested
23 methamphetamine.

24 **THE COURT:** No, I understand the facts.

25 **MS. deVRIES:** And the County had 10 days to

1 investigate this. This was a mandatory duty. This is not, you
2 know, something that maybe they could have just swept under the
3 carpet. This was something that they had a slew of mandatory
4 duties that they needed to comply with, and Mr. Kessler could
5 enumerate those if you would like, and they didn't, and that
6 was putting J.P. in danger of emotional harm, and as your Honor
7 knows, emotional harm is certainly recoverable under 1983,
8 under *Carey v. Piphus*, 435 U.S. 247, 1978.

9 This is very old law that is supporting these types
10 of damages in this type of claim, and our Complaint is replete
11 with specific harm that J.P. suffered under his constitutional
12 right, under the Fourteenth Amendment.

13 **MR. KESSLER:** Your Honor, if I may just add one more
14 thing, to accept the defendant's position in this, if M.M. did
15 not die, then we could have the same Complaint with the same
16 allegation, but we could go forward.

17 But their position is that because *Ward* is out there
18 and says that there is some case law that says that there's a
19 proposition that there's no wrongful death right to bring an
20 action by a sibling, therefore, all siblings in any situation
21 can't bring a right to the damages they suffer in a foster home
22 by virtue of the negligence and inaction of a social worker
23 that caused that harm, and that's absurd.

24 **THE COURT:** All right. The Second Cause of Action.

25 **MS. WIDEN:** Your Honor, may I respond to that

1 briefly?

2 **THE COURT:** Briefly.

3 **MS. WIDEN:** I would argue that the Complaint -- the
4 damages that are claimed in this Complaint almost exclusively
5 flow from the -- from Jeremiah's loss of his sister. That's a
6 loss of care, companionship and society claim.

7 I did not see very much in the Complaint that
8 articulated any loss separate from that, from the loss of his
9 sister. So I think that that is not what's alleged in the
10 Complaint.

11 Also, the defendants have acknowledged that there's
12 a duty on the part of the County to protect foster children
13 from harm. All of the cases that are cited by the plaintiff,
14 however, in their opposition, in those cases, the children were
15 actually physically harmed, and --

16 **THE COURT:** Well, you're not suggesting that
17 emotional damage isn't recoverable, are you?

18 **MS. WIDEN:** That's not in the cases.

19 **THE COURT:** So that's what you think?

20 **MS. WIDEN:** I think there has to be -- there has to
21 be an accompanying -- some type of other type of physical or --
22 molestation, or something like that.

23 **THE COURT:** What authority do you have for that
24 proposition?

25 **MS. WIDEN:** Well, my authority is that the cases

1 that have been cited don't address emotional harm, and I think
2 that *Ward* does address that.

3 **THE COURT:** Well, that's one case. Have you looked
4 at the.... Let me ask you the same question I asked them. How
5 many 1983 cases have you tried?

6 **MS. WIDEN:** Have I tried?

7 **THE COURT:** ...have you tried?

8 **MS. WIDEN:** I've only tried one, and -- but I've
9 handled probably close to a hundred.

10 **THE COURT:** And you've never seen a claim for relief
11 for emotional distress?

12 **MS. WIDEN:** I've seen it. I've certainly seen a
13 claim for relief from emotional distress. I have not
14 handled --

15 **THE COURT:** And was it stricken?

16 **MS. WIDEN:** No, where it's purely under Section
17 1983, it's not accompanied by any form of physical-type abuse.

18 **THE COURT:** Have you found any case -- is there any
19 Ninth Circuit case that says that claims for emotional distress
20 must be accompanied by physical harm? Are you aware of any
21 Ninth Circuit case --

22 **MS. WIDEN:** No, your Honor, I'm not. I'm happy to
23 brief that for you and do a little more research on it. Maybe
24 I should state my position another way.

25 I believe what is happening here is the plaintiffs

1 are -- the plaintiff is trying to use the duty that the County
2 owed to M.M., the breach of that duty as the source as to the
3 liability in this case. There was no breach of the duty to the
4 plaintiff.

5 **THE COURT:** So the fact --

6 **MS. WIDEN:** He was safe in the placement.

7 **THE COURT:** He was safe in a house where there
8 was --

9 **MS. WIDEN:** He wasn't harmed. He wasn't -- wasn't
10 harmed.

11 **THE COURT:** Just because someone is not harmed means
12 they're safe?

13 **MS. WIDEN:** I think under the case law that I've
14 read, yes.

15 **THE COURT:** Do you believe that having that child in
16 that house any day longer would have been a safe environment
17 for that child?

18 **MS. WIDEN:** That is not -- that's not my decision to
19 make. That was made by a juvenile --

20 **THE COURT:** I'm asking you --

21 **MS. WIDEN:** -- court, and I think that the foster
22 mother was permitted to keep the children. I mean, I'm not --
23 I don't want to get into the facts too much, but....

24 **THE COURT:** But what I'm talking about, I have to
25 look at this Complaint and read it in a plausible sense.

1 I have two children in a house, one of whom has died of
2 ingesting methamphetamine, and you want me to plausibly read
3 that the second child is safe in that house? That's what
4 you're asking me to do?

5 **MS. WIDEN:** Your Honor, I would agree under the
6 allegations of the Complaint --

7 **THE COURT:** Which is what we're looking at.

8 **MS. WIDEN:** -- that's true -- perhaps "safe" is not
9 the right word.

10 **THE COURT:** I would agree.

11 **MS. WIDEN:** I apologize to the Court on my misuse of
12 words. I think what I'm trying to argue here is that there was
13 no breach of the duty alleged to the minor.

14 **THE COURT:** You know, we're not at that stage. This
15 is not summary judgment. All I'm trying to figure out is
16 whether they stated a claim, and if your argument is that
17 having that child in that environment was not a danger, then
18 you lose that argument.

19 **MS. WIDEN:** Well, that's obviously not our entire
20 argument, your Honor.

21 **THE COURT:** All right, well, I'm looking for
22 something, but I'll come back to it. I think I understand the
23 first claim.

24 Second, intimate association. Again, with respect
25 to a sibling, what's the case authority for that?

1 **MS. deVRIES:** *Roberts*, Supreme Court -- in the
2 Supreme Court, and *Lee* in the Ninth Circuit. The Supreme Court
3 in *Roberts* specifically held multiple things, including that
4 intimate association includes a close group of connected
5 individuals, and certainly biological family would be included
6 in that, certainly siblings would be included in that. That
7 was 1981, I believe, your Honor.

8 And then you have *Lee* coming out of the Ninth
9 Circuit --

10 **THE COURT:** Have you cited those in your brief?

11 **MS. deVRIES:** I did, your Honor, and in *Lee* in
12 particular, it has some very nice language.

13 And here's another point that I think is perhaps
14 muddled by the waters we're looking at right now. Under the
15 Fourteenth Amendment, you can have multiple different claims,
16 of course. You could have a claim for due process or equal
17 protection or loss of familial association or loss of family
18 integration, and under the *Lee* case, Ninth Circuit -- which of
19 course is out of 2001, certainly well established by the time
20 we're here, your Honor -- the Court specifically goes through a
21 number of claims under the Fourteenth Amendment, as well as the
22 First Amendment, and it specifically holds, in *Lee*, under the
23 First and Fourteenth Amendment right to familial association
24 analysis, that there are at least two ways to look at the
25 intimate association claim under the First or Fourteenth

1 Amendment.

2 One is interference with the companionship and
3 society of the child, and that is something that I believe is
4 being presented to this Court as being the nature of our
5 Complaint when it is not.

6 The *Lee* case further goes on to talk about, quote --

7 **THE COURT:** Well, what is it, then?

8 **MS. deVRIES:** What it is, it's the relationship,
9 including family relationships, that presupposed these
10 attachments and commitments to the necessarily few other
11 individuals with whom one shares not only a special community
12 of thoughts, experiences and beliefs, but also distinctively
13 personal aspects of life, and of course --

14 **THE COURT:** Where is that in your brief? I don't
15 see it.

16 **MS. deVRIES:** It's probably in my brief and it's
17 certainly quoting the *Lee* case, which is at 250 F.2d -- I'm
18 sorry -- F.3d 666.

19 **THE COURT:** Well, I see *Lee* here. I don't see the
20 quote.

21 **MS. deVRIES:** Okay, and the quote actually comes
22 from *Roberts v. United States Jaycees* at 468 U.S. 609, and 619
23 through 620, and of course, that's the Supreme Court, 1984.

24 And what's interesting about *Lee* coming out, of
25 course, in the Ninth Circuit, is that it goes through the

1 *Barber* case very carefully for the specific purpose of making
2 sure that there's a distinct -- a distinguishing analysis of
3 the First Amendment as having both a component of intimate
4 association for society and companionship, as the *Ward* case
5 said, the siblings don't have, and this other type of
6 relationship that is not the wrongful death companionship and
7 society, but it is something else.

8 **MR. KESSLER:** And it is cited in our brief, your
9 Honor, on pages 8 and 9, bottom of --

10 **THE COURT:** I see the section, 8 and 9. I didn't
11 see the quote. All right, a response?

12 **MS. deVRIES:** Thank you.

13 **MS. WIDEN:** Yes, your Honor. As to the Fourteenth
14 Amendment claim for loss of familial association, I do believe
15 *Ward* applies to that specifically.

16 **MS. deVRIES:** There is no such claim here.

17 **THE REPORTER:** I'm sorry, if you're speaking for the
18 record --

19 **MS. deVRIES:** I'm sorry. There is no such claim
20 here.

21 **MS. WIDEN:** I believe it's familial --

22 **THE COURT:** Stop interrupting.

23 **MS. WIDEN:** -- or intimate association.

24 **THE COURT:** Counsel, do not interrupt.

25 **MS. deVRIES:** Okay, your Honor.

1 **THE COURT:** Go ahead.

2 **MS. WIDEN:** For loss of familial or intimate
3 association, I do believe the *Ward* case applies to that, in
4 terms of the Fourteenth Amendment claim.

5 **THE COURT:** Can I ask, do you have any other
6 authority other than *Ward*? That is, is your -- when I go
7 through these claims, are you just going to say, "*Ward*," so if
8 I read *Ward* and disagree with you, I know that I don't have to
9 do anything else?

10 **MS. WIDEN:** Our main reliance is on *Ward*, your
11 Honor, and I would argue, at least on the First Amendment
12 claims, that *Ward* would also -- the reasoning of *Ward* would
13 apply to those claims, as well. We did cite a case --

14 **THE COURT:** Well, explain to me why *Roberts* and *Lee*
15 does not apply.

16 **MS. WIDEN:** Well, I would argue that *Lee* doesn't
17 apply because it deals with the claims of a mother, which is
18 entirely consistent with *Ward*. In *Ward*, the Court said that
19 parents have a right to -- a liberty interest, essentially, in
20 intimate and familial association with their children.

21 So that the *Lee* case does not conflict with *Ward*.
22 It's actually --

23 **THE COURT:** Do *Roberts* and *Lee* address sibling
24 relationships?

25 **MS. deVRIES:** I'm sorry, do what and *Lee*?

1 **THE COURT:** Do *Roberts* and *Lee* address sibling
2 relationships?

3 **MS. deVRIES:** *Roberts* says, and has been interpreted
4 by many courts, as having done so. *Lee* does not specifically.

5 **THE COURT:** Is there any Ninth Circuit case that has
6 extended the intimate association to siblings?

7 **MS. deVRIES:** Ninth Circuit, only in an unpublished
8 decision by Judge --

9 **THE COURT:** Don't cite to me unpublished decisions.
10 They are not persuasive. If you've -- well, you wouldn't have
11 sat on the Ninth Circuit, but there are reasons why they're not
12 published.

13 **MS. deVRIES:** Can you repeat your question, your
14 Honor, please?

15 **THE COURT:** Is there any Ninth Circuit case that has
16 extended intimate association to siblings?

17 **MS. deVRIES:** There are -- no, your Honor.

18 **THE COURT:** All right. *Roberts* was a siblings case?

19 **MS. deVRIES:** *Roberts* addressed the concept of
20 siblings, as have many other cases.

21 **THE COURT:** What is the best circuit court case to
22 address intimate association between siblings?

23 **MS. deVRIES:** In *Patel* -- just a moment, I'll grab
24 it for your Honor -- it's a Second Circuit case. There are, as
25 I've put in my brief, your Honor, there are several district

1 courts that have looked at this issue, including Judge Shubb,
2 Judge Chambers, Judge England, several.

3 *Patel v. Searles*, 305 F.3d 130 --

4 **THE COURT:** So in the future, if you give me a table
5 of authorities, I won't have to scan your brief for cites.

6 **MS. deVRIES:** Noted, your Honor. I'll be sure to do
7 that. This was a short brief. I apologize for that.

8 **THE COURT:** Okay, so what page on your brief is it
9 cited?

10 **MS. deVRIES:** I have not cited *Patel* in my brief.
11 I gave opposing counsel notice that I may have to cite *Patel* in
12 this argument this morning at 9:30.

13 **THE COURT:** All right, so what's the case?

14 **MS. deVRIES:** I'm sorry, *Patel v. Searles*.

15 **THE COURT:** How do you spell that?

16 **MS. deVRIES:** S-E-A-R-L-E-S, 305 F.3d 130, 137,
17 Second Circuit 2002, and the quote here is,

18 "Defendant's view in that case was that intimate
19 association must exclude siblings, and the Court's
20 response was, simply put, defendant's view is
21 inconsistent with *Roberts'* statement that family
22 relationship -- excuse me -- that constitutional
23 protections for associational interest are at their
24 apogee when close family relationships are at
25 issue."

1 So here the question may be, well, how close were
2 these siblings? And that's really where we should be, is
3 discussing whether this Complaint articulates a sufficient
4 relationship to fall within the ambit of the intimate
5 association case law of the First Amendment, and I would submit
6 that it certainly is, but I would defer to Mr. Kessler to argue
7 that, if he wishes.

8 **THE COURT:** Any comment on *Patel*?

9 **MS. WIDEN:** Your Honor, I have not had a chance to
10 review or research *Patel*, and if it's an important case that
11 the Court intends to consider, I would request an opportunity
12 to submit a supplemental brief on that.

13 **THE COURT:** Okay. Third claim, best cases for
14 expressive association.

15 **MS. deVRIES:** The same cases, your Honor.

16 **THE COURT:** So *Roberts* identified an intimate
17 association and an expressive association? What is the
18 difference, in the elements?

19 **MS. deVRIES:** The difference is the type of
20 association, in terms of the conduct. So expressive
21 association, I think the best way to think about it, your
22 Honor, is what is expressly stated in the First Amendment,
23 speech, assembly, advocacy.

24 So for expressive, we have facts in our Complaint
25 that we have J. advocating for his sister, and would have

1 continued to do so in the foster care system, as one might need
2 to. It's a different type of conduct that's protected, your
3 Honor.

4 **MR. KESSLER:** Your Honor, if I --

5 **THE COURT:** What are the elements of an intimate
6 association claim?

7 **MS. deVRIES:** I brought it under both the First and
8 Fourteenth Amendment. Here, because the cases are --

9 **THE COURT:** I just asked for the elements. Do you
10 know them or not?

11 **MS. deVRIES:** The elements is that there's a family
12 relationship with a deep attachment, and then the element that
13 there was an invasion of that relationship; and of course,
14 causation and damages. And here, we have the deliberate
15 indifference to that right.

16 **THE COURT:** And what are the elements, then, for an
17 expressive association?

18 **MS. deVRIES:** Again, it's similar. We pled it under
19 the First and Fourteenth because it's -- it can be under
20 either.

21 **THE COURT:** Well, ultimately, only move under one.
22 I'm not going -- it is not appropriate to have two
23 constitutional amendments which give rise to the exact claim.

24 **MS. deVRIES:** I have --

25 **THE COURT:** So the more specific controls -- it

1 would seem to me that if it is a First Amendment claim, then
2 it's a First Amendment claim. The Fourteenth is a catch-all.

3 **MS. deVRIES:** Agreed, your Honor. There are cases
4 describing the Fourteenth Amendment as including the right to
5 family integrity, to live with your close family members, those
6 types of claims that are obviously different from loss of
7 consortium or loss of society, loss of companionship.

8 And so the Fourteenth Amendment tends to be cited in
9 many, many cases as being encompassed under this broad
10 association claim. So that's why we put both, to make sure
11 that we covered it, but I understand matters concerned, which
12 is why the First Amendment appears on the --

13 **THE COURT:** So again, the elements for an expressive
14 association.

15 **MS. deVRIES:** That the -- there's a relationship,
16 that they engaged in --

17 **THE COURT:** Well, how -- so the second, you said
18 there's a family relationship with a deep attachment, and at
19 two, there's an invasion, plus causation and damages, but
20 that's a given. So how is the third different?

21 **MS. deVRIES:** It's the nature of the relationship,
22 that they've engaged in some type of expressive conduct, that
23 there is an expressive conduct element, and that expressive
24 conduct has been defined by numerous cases as being anything
25 from relating to advocacy or being part of an association

1 that's involved in advocacy --

2 **THE COURT:** So you don't actually have a case that
3 identifies for me the elements of your claim.

4 **MS. deVRIES:** I do have a case. I wasn't asked to
5 come to court to argue the elements of the claim --

6 **THE COURT:** Well, if you don't know the elements of
7 the claim, then how can you plead them?

8 **MS. deVRIES:** I believe that what is pled in this
9 Complaint -- and I do appreciate your Honor's concern --
10 satisfies the elements of this claim.

11 **THE COURT:** But you can't articulate the elements.

12 **MS. deVRIES:** I can certainly brief for your Honor
13 the elements that are in our Complaint under the Third Cause of
14 Action.

15 **THE COURT:** Do you see where I'm going, here?

16 **MS. deVRIES:** I do see where you're going, your
17 Honor.

18 **THE COURT:** So I need to know what the elements are,
19 and I need to know what the legal authority is for the
20 elements.

21 **MS. deVRIES:** The legal authority would be *Roberts*
22 and its progeny.

23 **THE COURT:** Except that *Roberts* won't tell me what
24 the elements are, because if they were, you would have told me.
25 Right?

1 **MS. deVRIES:** Well, as your Honor earlier stated,
2 constitutional law can be a little bit --

3 **THE COURT:** Exactly.

4 **MS. deVRIES:** -- more --

5 **THE COURT:** So we're not exactly sure on this one,
6 it sounds like.

7 **MS. deVRIES:** I am anticipating --

8 **MR. KESSLER:** Can I step in and say something,
9 please? While the Complaint perhaps could be more specific as
10 to the elements that the Court wants to see, that's fine.

11 What I want to add -- what I'm going to say is that
12 the question, I think, that -- is not whether or not there is a
13 case on point within our jurisdiction that would allow this
14 claim to go through, but is the current case law, such as
15 *Roberts* and its progeny, do they allow for us to be bringing
16 the claim that we're bringing, based on what they're saying,
17 and is there anything that would preclude us from doing so, and
18 the --

19 **THE COURT:** You have to have a claim in order to
20 bring it. The other side is arguing that you don't have a
21 claim.

22 **MR. KESSLER:** Well, we do have a claim.

23 **THE COURT:** Then what you're articulating isn't
24 based in constitutional law. So at some point in time, at some
25 point in time I'm going to have to figure this out, because

1 I've got to instruct a jury.

2 **MS. deVRIES:** Of course, your Honor.

3 **THE COURT:** And frankly, I would rather figure it
4 out on the front end than I would on the back end.

5 **MS. deVRIES:** Well, we would take --

6 **THE COURT:** And it may be that you have some of this
7 and you don't have others. I don't know.

8 **MR. KESSLER:** Okay.

9 **THE COURT:** But we are going to do the hard work
10 now --

11 **MR. KESSLER:** Right.

12 **THE COURT:** -- rather than later.

13 **MR. KESSLER:** Right.

14 **MS. deVRIES:** Great.

15 **MR. KESSLER:** And we'll help you do whatever you
16 need us to do with regard to that. But I do want to say that
17 what the defendant's saying is that no matter how we specify
18 the nature of the right that we know exists here, and that
19 we've alleged, perhaps not as well articulated as we should,
20 they're saying that we don't have a claim at all, no matter how
21 we frame it on this, and that's what we're arguing. We are
22 certainly well prepared to address that issue.

23 **THE COURT:** And I understand that argument. There
24 are multiple layers here.

25 All right, a response. Anything to say?

1 **MS. WIDEN:** No, your Honor, I don't think so, not at
2 this time. I mean, I think that you asked whether or not --
3 you know, what our case was that said that prevented this claim
4 legally, it's *Ward*, and that is the answer to that; and the
5 fact that there is no case in the Ninth Circuit that allows for
6 this specific type or has recognized an intimate association
7 claim between siblings, or a liberty interest that exists
8 between siblings as to that claim, and it's our argument that
9 the fact that the Court found in *Ward* that there is no
10 liberty -- protected liberty interests under the Fourteenth
11 Amendment would apply equally to a First Amendment claim,
12 because the interest -- the liberty interest is identical under
13 both, and we cited in our papers to that proposition the
14 *Trujillo* case, which was out of the Tenth Circuit, 1985 --

15 **THE COURT:** It's pronounced, "tru-HEE-oh."

16 **MS. WIDEN:** *Trujillo*.

17 **THE COURT:** *Trujillo*.

18 **MS. WIDEN:** *Trujillo* case.

19 **THE COURT:** T-R-U-J-I-L-L-O.

20 **MS. WIDEN:** The cite on that is 768 F.2d 1186, and
21 under that case, the Court considered a Fourteenth Amendment
22 intimate association claim alongside a First Amendment intimate
23 association claim, and treated them identically, and found that
24 the claims did not -- were not recognizable (sic), and these
25 involved a mother and siblings.

1 **THE COURT:** I thought *Trujillo* held that a sibling's
2 relationship clearly falls within the protected range
3 established by *Roberts*.

4 **MS. WIDEN:** True.

5 **THE COURT:** *Trujillo*, jump cite 1189.

6 **MS. WIDEN:** Then I may be mis-citing that if -- it
7 was my understanding in *Trujillo* they held that there was no
8 cognizable violation of any constitutional right, and treated
9 the liberty interest the same.

10 I could be wrong about that. They could have found
11 that there was a right in the Tenth Circuit, but that I think
12 the fact that they treated them identically was what I was
13 pointing out in that case, and then in the Ninth Circuit, they
14 handle it differently than the Tenth Circuit. In the Ninth
15 Circuit, in *Ward*, there is no right under the Fourteenth
16 Amendment.

17 **THE COURT:** Response.

18 **MR. KESSLER:** Your Honor, I'm going to say, on the
19 cause of action we're looking at right now, we do cite
20 specifically, on paragraph 87, the well-established and
21 ingrained right of siblings to be -- and their relationship to
22 be protected, that with numerous laws, in both state and
23 federal law, that are cited throughout our -- cited in this
24 section but also incorporated in paragraph 15, 16, 54 and 55 of
25 our Complaint, all of which cite the protections that are

1 guaranteed and afforded to foster care children in foster
2 homes, by the state.

3 **THE COURT:** Claims for qualified immunity
4 potentially rise and fall with -- or at least, I have to
5 certainly know the answer on one, two and three before getting
6 to qualified immunity, right? Do you agree?

7 **MS. WIDEN:** I would agree with that, your Honor. If
8 there's no constitutional violation, then there would be no
9 need to address qualified immunity, or put another way, the
10 first prong of the analysis is whether or not there was a
11 constitutional violation stated.

12 **THE COURT:** Injunctive relief. This isn't being
13 currently brought as a class action. So what injunctive
14 relief, relative to the specific plaintiff, can I be dealing
15 with?

16 **MR. KESSLER:** Well, the child is currently still a
17 foster child.

18 **THE COURT:** I thought he's out of the house, and his
19 guardian *ad litem* is the person bridging the lawsuit.

20 **MR. KESSLER:** That's correct.

21 **THE COURT:** So what would I be enjoining the County
22 to do relative to him, given that it is not currently being
23 brought as a class action?

24 **MR. KESSLER:** Two things. First, at any moment, the
25 County can, by its own discretion, decide that they want to

1 remove him and place him into another home, with whatever
2 justification they could come up with, and then --

3 **THE COURT:** With respect to that, I think in terms
4 of the Complaint, you have to actually allege that you have
5 indications of a changed circumstance.

6 **MR. KESSLER:** No, what I'm trying to emphasize is
7 the County system has the power to take such action. I'm not
8 trying to say that that is, indeed, what -- it's the next point
9 I want to get to that really, I think, addresses the Court's
10 question, and that is, he still has ongoing harm that he's
11 addressing by virtue of trauma he suffered as a result of
12 what's alleged in this Complaint.

13 The County are the ones that are in charge of his
14 care, the provisions of services he gets or doesn't get, when
15 he gets them, and to what extent the prospective adoptive
16 parent can be supported in addressing those needs along the
17 way. Those are all ongoing concerns. They're all tied and
18 connected and completely intertwined with the event that caused
19 this problem in the first place, leading to this lawsuit.

20 **THE COURT:** And where -- let's see. Let me look at
21 your allegations in that regard.

22 **MR. KESSLER:** Well, in paragraph 73, I certainly
23 allege that there's extreme emotional trauma.

24 **THE COURT:** I'm looking at your Seventh Cause of
25 Action.

1 **MR. KESSLER:** Oh, I'm sorry. Excuse me.

2 **THE COURT:** At 114.

3 **MR. KESSLER:** All right. So it's stated quite
4 clearly in 118 through 120.

5 **THE COURT:** Well, 117 says, a failure to respond and
6 investigate neglect or abuse of reports and referrals, and 118
7 says that's going to continue. 120 talks about training. So
8 what you articulated, it's not clear that it's in the
9 Complaint.

10 **MR. KESSLER:** I could give an example.

11 **THE COURT:** I understand what you're saying. I'm
12 just not sure it's in your Complaint.

13 **MR. KESSLER:** Well, I mean, an example that it falls
14 within the parameters of this Complaint is that if it's a
15 potential adoptive parent is seeking help from the County, who
16 is the one who is provider of the care and authorizing such
17 care, and want certain services to happen, want some support to
18 be in place, wants an evaluation or something to happen, and
19 the County refuses or delays in it to the detriment of child,
20 and that's part of the duties that they are -- that they are,
21 in my mind, not only obligated to do, but I think there's a
22 risk that they will continue to fail to do.

23 **THE COURT:** In paragraph 82 of your Complaint, why
24 do you have "and his sister" in brackets, in paren, given that
25 you claim that you're not asserting any claims derivatively?

1 **MS. deVRIES:** It's a factual statement, your Honor.

2 **MR. KESSLER:** It has no more meaning than to
3 emphasize that they were together, they were going through this
4 together, they were being treated together. There's a lot of
5 siblings, your Honor, that one is placed in foster care, the
6 other may be with a relative or remain with a parent, or they
7 may be placed separately. These children were together from
8 the jump, and that's --

9 **THE COURT:** So it's somewhat superfluous. There's
10 no --

11 **MR. KESSLER:** It's factually but not legally
12 significant.

13 **THE COURT:** Okay. Have each of the individual
14 defendants answered the Complaint?

15 **MS. deVRIES:** No, your Honor. No, the individuals
16 and the County has not. They filed this motion.

17 **THE COURT:** No, I said, the individual defendants
18 I thought I had --

19 **MR. KESSLER:** -- any of the individuals.

20 (Simultaneous colloquy.)

21 **THE COURT:** I thought I had --

22 **MR. KESSLER:** Yeah, Ms. Morgan --

23 **MS. deVRIES:** Ms. Morgan has responded, your Honor.

24 **MR. KESSLER:** Yeah. One, is the answer.

25 **THE COURT:** What about Maas?

1 **MS. WIDEN:** Yes, your Honor, the two County
2 employees, Maas and May, are also parties to the present motion
3 to dismiss and have asserted qualified immunity. So they
4 responded by virtue of the motion to dismiss, but no answers
5 have been filed on their behalf yet.

6 **THE COURT:** Triad Family Services?

7 **MS. deVRIES:** Yes, they answered.

8 **THE COURT:** They answered? Moore has answered?

9 **MS. deVRIES:** Yes, your Honor.

10 **THE COURT:** Okay, I'll give you a trial schedule.

11 **MS. deVRIES:** Thank you, your Honor.

12 **THE COURT:** Other counsel can come up, if you want
13 to be heard on this. Spread out. No one's going to bite in
14 this courtroom.

15 Okay. I doubt that this motion to dismiss is going
16 to succeed, at least in some measure, so don't sit on your
17 heels. How much discovery do you think you're going to need in
18 this case?

19 **MS. deVRIES:** We've already conveyed that we're
20 ready to start taking depositions. It's my understanding that
21 defense counsel needs to go to state court to do an 827 motion
22 under the California Welfare and Institutions Code to get
23 access to some records. I understand there's some press that's
24 already done that, so I'm not sure if they've started the
25 process yet.

1 **MS. WIDEN:** That's true, your Honor. We do need to
2 start the 827 process in order to be able to --

3 **THE COURT:** So I don't practice in that area. 827
4 is what?

5 **MS. WIDEN:** It's under Welfare and Institutions Code
6 827. All juvenile case file records, including CPS records,
7 are confidential, and if they -- it's a crime to disclose them
8 without obtaining an order from the juvenile court.

9 **THE COURT:** Okay.

10 **MS. WIDEN:** So it's a petition that has to be filed.
11 My experience is that different courts handle the process very
12 differently.

13 **THE COURT:** It's here, in Alameda County?

14 **MS. WIDEN:** Well, I think in this case we'll need
15 Alameda County as well as San Joaquin County. I've had
16 different experiences in Alameda County Superior Court
17 depending on what the -- which judge -- well, it depends on
18 which judge gets assigned to handle it, but sometimes they'll
19 order up the entire file and review it themselves and redact
20 and do all of that. Other times, they'll have County Counsel
21 do it. I've had it different ways, but it usually takes a
22 little while. In this case --

23 **THE COURT:** I don't know what "a little while"
24 means.

25 **MR. KESSLER:** I can maybe help everybody.

1 **MS. WIDEN:** Yeah, I've had it take up to a year,
2 but --

3 **THE COURT:** Oh, it will not take up to a year, if
4 I have to get on the phone myself.

5 **MS. WIDEN:** In this case, there have been previous
6 petitions filed by other parties. So I suspect that they will
7 have the records already gathered, and that's half of the
8 battle. So I think it probably wouldn't take as long in this
9 case.

10 **MR. KESSLER:** I have gone through that process, and
11 I have gone through back-and-forth hearings to have files
12 disclosed, redacted and approved by the Court, and ultimately,
13 I have what I believe now is a complete set of materials, that
14 I am unfortunately unable to disseminate by the law cited, but
15 I believe an easy mechanism to facilitate this would be if this
16 Court -- if we could come up with a protective order, and then
17 the parties can attach that protective order to a request to
18 the juvenile court, and I could tell them the specific judge
19 who went through the process with me, and that judge would
20 likely then approve a disclosure of what was provided to me, or
21 allow me to disclose to the other parties what I have, and I'd
22 be happy to do so.

23 **MS. deVRIES:** And we've met and conferred on this,
24 your Honor, in advance of the previous CMC that was scheduled
25 by this Court. That's why I wasn't sure if anything had

1 happened yet on defendants' end.

2 **THE COURT:** That sounds like a good process. I was
3 an Alameda County Superior Court Judge. I know all the
4 judges -- not all of them, most of them. If you have any
5 issue, you call me, and I will make a phone call.

6 **MS. deVRIES:** Thank you, your Honor.

7 **THE COURT:** They are very busy, but they can
8 prioritize things, especially if they get a phone call.

9 All right, so back to my original question: How
10 much time do you need for discovery? Once that process
11 happens, you've got -- you know, this isn't like we don't know
12 who the people are. There are a known number of depositions.
13 I don't know what discovery you need to do, and in terms of any
14 *Monell* claims, you'll obviously get a order from me telling you
15 what's left, all or some, and then we'll move from there.

16 But how much time do you think you need?

17 **MR. ENABNIT:** So your Honor, for Triad, I would
18 anticipate that for non-expert depositions, I would anticipate
19 perhaps, ten, twelve tops, some law enforcement, San Joaquin,
20 CPS people, the parties, and I would anticipate eight months or
21 so for that process.

22 **MS. deVRIES:** If they move along on the 827 process,
23 that sounds about right. My concern is only that we get
24 started sooner rather than later. I really appreciated your
25 Honor's advance of the CMC date to have it on the same day,

1 today.

2 **THE COURT:** So eight months would be middle of
3 October. Does everybody agree that's enough time?

4 **MS. LANDESS:** Well, your Honor, if I may, Elizabeth
5 Landess for Ms. Moore.

6 I think the issue is, we can't -- especially with
7 the County employees, none of them can be deposed until all the
8 827 procedures are in place. I'm dealing with another case
9 right now in San Mateo County where we have the same issue,
10 and --

11 **THE COURT:** I don't know the judges there, can't
12 help you.

13 **MS. LANDESS:** That's too bad, your Honor, thank you,
14 but all those -- all of those depositions were basically sort
15 of held in abeyance, to a great degree, because they had those
16 proscriptions about disclosing all this confidential
17 information.

18 **THE COURT:** Well, but I rarely am not here. If we
19 have to adjust, we have to adjust. We can do that.

20 So other concerns about eight months?

21 **MS. WIDEN:** My preference would be for 12 months, to
22 give us a little bit more of a cushion but, you know, I guess
23 we could say eight months and come back if we have to.

24 **MR. KESSLER:** Well, the delay won't be from our end,
25 because we're ready.

1 **THE COURT:** Counsel?

2 **MR. ZINOVYEV:** Eugene Zynovyev. I'm co-counsel with
3 Ms. Landess.

4 **THE COURT:** Okay, that's fine. Typically, you
5 should know, I only allow one attorney to talk, but given how
6 you described your relationship with this case, I allowed both
7 of you to argue. It's not typically what I do. All right?

8 **MS. deVRIES:** Yes.

9 **MR. KESSLER:** Thank you.

10 **THE COURT:** Okay. Let's -- well, let me ask a few
11 more questions. All right, so once your non-expert discovery
12 is concluded, what are you thinking, in terms of expert
13 discovery, how much are you going to need?

14 What I would typically do is require simultaneous
15 opening reports, then rebuttal reports, and then depositions.
16 That's typically how I do things.

17 So how much time, after the close of expert --
18 non-expert discovery, before you -- you know, before you can
19 get your experts' reports out, and what are you thinking in
20 terms of what kind of experts you're going to have?

21 **MR. ENABNIT:** Your Honor, again, Ron Enabnit for
22 Triad. I have not spoken with any of the counsel, but this is
23 a case which seems to lend itself to a psychiatric exam of
24 J.P., since that's the party who's --

25 **THE COURT:** I think that's probably right, and --

1 **MS. deVRIES:** Your Honor, one for all the defendants
2 or...?

3 **THE COURT:** Well, look. How old is he now?

4 **MS. deVRIES:** He's five -- oh, is he six?

5 **MR. KESSLER:** Seven now.

6 **MS. deVRIES:** Seven. Just had a birthday.

7 **THE COURT:** He's seven years old. You are all
8 ordered to meet and confer, and make sure that to the extent
9 that he is being subjected to tests and/or expert analysis,
10 that we are doing it in the most humane way possible. I will
11 come down hard on anyone who I think is not doing that.

12 **MS. deVRIES:** Thank you, your Honor.

13 **THE COURT:** So my hope is that you can all agree on
14 someone who you all believe is a good expert, and have one
15 expert, rather than having him subjected to multiple experts.

16 I mean, you know, I am typically a little jaded with
17 experts because, you know, they're the hired guns, for whatever
18 side. But perhaps we can find someone who everybody agrees on
19 and who is the consummate professional to provide an opinion.
20 I don't know. That would be my hope.

21 **MS. WIDEN:** It seems to me that this is a case where
22 the defense could share an expert on that, yeah.

23 **MR. ENABNIT:** I don't anticipate a problem, your
24 Honor. Ronald Enabnit.

25 **THE COURT:** So, psychiatrist, what else?

1 **MR. KESSLER:** There may be an expert social worker;
2 I'd say likely will be.

3 **MR. ENABNIT:** For the defense, as well.

4 **MS. WIDEN:** Yes.

5 **MS. LANDESS:** Probably a toxicologist.

6 **MR. KESSLER:** Yes.

7 **THE COURT:** Okay, so half a dozen or so. All right,
8 so 30 days after close of non-expert discovery --

9 **MS. WIDEN:** To exchange expert reports?

10 **THE COURT:** -- to exchange reports.

11 **MS. WIDEN:** That's fine.

12 **THE COURT:** And then what I would typically do is 15
13 days for rebuttal. Does that work?

14 **MS. deVRIES:** Depending on the holidays, your Honor,
15 if we just might be a little sensitive to that.

16 **THE COURT:** I just want to know -- I'm totally aware
17 of the holidays. That's why I'm trying to figure out what my
18 time intervals are. Typically, I would do 15 days. Yes? And
19 then, if you're looking at a dozen depositions, then probably
20 need 21 days, to the close.

21 Okay, so in terms of summary judgment, to the extent
22 that summary judgment is brought, are you going to need expert
23 discovery? I mean, it seems to me that in 1983 cases, summary
24 judgments brought on qualified immunity, perhaps, sometimes
25 defendants try to get summary judgment, but I find it hard to

1 believe that we're going to end up, after discovery, with
2 undisputed material facts. I don't know.

3 **MR. ENABNIT:** On some claims, perhaps, your Honor,
4 but Triad does anticipate bringing them on the issue of whether
5 it's a state actor, among other issues.

6 **THE COURT:** Well, you don't need expert discovery
7 for that.

8 **MR. ENABNIT:** I do not.

9 **THE COURT:** Have you ever been found to be a state
10 actor in a 1983?

11 **MR. ENABNIT:** Not to my knowledge, your Honor.

12 **THE COURT:** Have you ever -- has it ever been
13 litigated?

14 **MR. ENABNIT:** I've researched the issue and I've not
15 found a case that stands for the proposition that a foster
16 family agency has been held to be a state actor for purposes of
17 1983.

18 **THE COURT:** But is the opposite true? Has it been
19 litigated where someone has found the agency not to be a state
20 actor?

21 **MR. ENABNIT:** I'm not aware of a case either way,
22 your Honor.

23 **THE COURT:** Are you?

24 **MS. deVRIES:** I'm aware of a case that held that it
25 was not a state actor based on the particular facts of that

1 case, which we will be able to distinguish in this case.

2 **THE COURT:** Okay, so you don't need expert discovery
3 for that.

4 **MR. ENABNIT:** Correct.

5 **THE COURT:** All right. Any other thoughts with
6 respect to dispositive motions? Are you going to need expert
7 discovery?

8 One of the reasons I ask the question is because
9 sometimes I will give you a schedule that allows you to bring
10 those motions before expert expenses are incurred. That way,
11 you don't incur the expenses on either side unnecessarily.

12 **MR. ENABNIT:** That would be Triad's preference, your
13 Honor.

14 **THE COURT:** How about the other defendants, are you
15 going to need expert discovery?

16 **MS. LANDESS:** Well, it's -- at this point, it's a
17 little bit difficult to -- since we have very little
18 information on the medical records, et cetera, I find it hard
19 to, at this point, conceive of something like that, but I guess
20 it's always possible. I guess it's -- perhaps we could, if
21 it's something we could revisit at a later date, if --

22 **THE COURT:** Well, you can ask for leave to be
23 relieved from the schedule. We're doing the best we can, and
24 you're going to get a schedule.

25 **MS. LANDESS:** Certainly.

1 **MS. WIDEN:** I don't anticipate needing expert
2 testimony to support a motion for summary judgment at this
3 time, but again, there is a lot out there that we don't know
4 about this case yet, so....

5 **THE COURT:** All right. Well, let's do it this way,
6 then. Non-expert discovery to close October 31st. Summary
7 judgment motions to be filed no later than November 13th.

8 Then your expert reports, I'll have those disclosed
9 January 18th. Opposition, February 15th. Close of expert
10 discovery, March 7th.

11 **MS. deVRIES:** Your Honor, if there are going to be
12 three motions for summary judgment, which may be the situation,
13 would the Court entertain a longer period for us to oppose them
14 than the two weeks, over the holiday?

15 **THE COURT:** We'll talk about summary judgment in a
16 minute.

17 **MS. deVRIES:** Thank you.

18 **THE COURT:** The way my trials work, you have to
19 exchange exhibits about 28 days -- about two months before your
20 trial, because of everything that I require in terms of filing.
21 It seems to me, if this case is going to trial, you're going to
22 know it during the expert period; you can be double-tracking.

23 I can give you a trial date, let's say, April 29th.
24 Does that work?

25 **MR. ENABNIT:** If I could just have one moment, your

1 Honor?

2 **MS. deVRIES:** Fine for plaintiff, thank you.

3 **MS. LANDESS:** Fine for defendant Moore, your Honor.

4 **MS. WIDEN:** Fine for the County defendants, your
5 Honor.

6 **MR. ENABNIT:** And for Triad, as well, your Honor.

7 **THE COURT:** Okay, so April 29th. That means your
8 pretrial conference will be April 12th. You'll be placed on a
9 compliance calendar, or -- I'm sorry.

10 Your pretrial statements, then, are due -- and
11 you'll get a long order with all these dates -- March 29th.
12 Then you'll be placed on a compliance calendar for March 22nd.

13 I don't expect to see you here on that date. What
14 I will expect is that five days prior, five business days
15 prior, you will file a joint submission that says, Judge, we've
16 looked at your standing order, we are complying, everything is
17 working, we have no issues.

18 **MS. deVRIES:** Okay.

19 **THE COURT:** Because there are lots of things that
20 have to happen in order to meet my filing deadlines. If things
21 are not working, that is when I want to know. That's why I put
22 you on a compliance calendar. I don't want to find out weeks
23 later. So I want to intervene early. Okay? That's the point
24 of that, in terms of dispositive motions.

25 **MR. KESSLER:** Your Honor, just for clarity,

1 March 22nd is the date that we have to have it submitted to
2 you, or is that the date that we would come here if it's an
3 issue?

4 **THE COURT:** It's on the calendar for the 22nd, and
5 this is a routine thing that I do, so you may see it multiple
6 times. All that typically means is I've got it on my calendar.
7 So it's a Friday, at 9:01 a.m. The prior Friday, you have to
8 do your filing.

9 **MR. KESSLER:** Okay.

10 **THE COURT:** And then I take it off calendar, if
11 everything works.

12 **MR. KESSLER:** Okay, got it.

13 **THE COURT:** If it doesn't, then I've got you on my
14 calendar. But this is just a mechanism that I use to make sure
15 things happen.

16 **MR. KESSLER:** Okay.

17 **THE COURT:** Okay? Dispositive motions. I use a
18 process that's routinely used in the Southern District of New
19 York. It is not routinely used in this district, and that is,
20 before you can file a motion for summary judgment, you must
21 come and have a conference with me. This process is laid out
22 in my standing order. Make sure to read it.

23 In general, whoever wants to bring a motion files an
24 executive summary, three pages, tells me what they want to do,
25 what the basis of the motion is, and give me some law.

1 The other side has to respond promptly, in three
2 days. I get you on my calendar the following week, typically.
3 Wednesdays and Fridays are when I do not have standing
4 calendars, so I will try to fit you on in on one of those days,
5 and then we have a discussion about your motion before you file
6 it.

7 It is at that time that I figure out how most
8 effectively to do the briefing. If I have cross-motions, what
9 we're going to do, if I have joint motions, what we're going to
10 do, how to make this as most -- as efficient as possible.

11 So the date that I gave you is the last day that you
12 can file. Now, you need to make sure that you've come in in
13 advance, so that you can make your filing deadline.

14 In addition, you know, for something like what
15 you're suggesting, I don't know why you necessarily wait, if
16 you think -- now, you only get one motion, so maybe that's the
17 reason you wait; because once you use it, you don't get it
18 again.

19 So that could be a reason why you wait, and it gives
20 me an opportunity to kind of preview your motion. Sometimes,
21 in some cases, plaintiff brings, let's say, 10 causes of
22 action. By the time discovery closes, you really only have six
23 good ones.

24 This process has frequently ended up where the
25 plaintiff says, yeah, we agree, we're going to dismiss four.

1 We do that with no motion work, which is not typically allowed
2 under the Federal Rules.

3 And there have been times when I really pushed on
4 people about, you know, about bringing their motion, sometimes
5 the clients require it, and in many ways, I feel like this
6 gives the attorneys cover when I tell them, okay, you go back
7 and tell your client, a three-page denial after you spend
8 \$80,000 on this motion, or a couple hundred thousand dollars,
9 depending on how the big the case is.

10 If I'm trying a case, I don't make findings of fact.
11 I don't write big orders denying motions for summary judgment.
12 I am not interested in getting painted into any corner.

13 So in any event, we have a discussion. I can't stop
14 you from filing motions, but I can have a discussion with you
15 about the motion.

16 Questions on the process?

17 Okay. With respect to amendment of pleadings, I'll
18 decide that in the context of the 12(b)(6) motion. At some
19 point, you're going to have to go to ADR, because I require all
20 of my cases to go to ADR, assuming it's not thrown out.

21 What do you want to do, on that front?

22 **MS. deVRIES:** We've met and conferred, and in the
23 joint CMC we filed, we've agreed to go to a magistrate judge,
24 and I believe we've elected Judge Beeler, but plaintiff is open
25 to any judge that would be appropriate for this case.

1 **THE COURT:** Yes?

2 **MS. WIDEN:** Yes, that's true. We have met and
3 conferred, and would support that referral to Judge Beeler, if
4 possible.

5 **THE COURT:** How much discovery do you need before
6 meeting with her, do you think? That is, when in this process
7 that we've laid out do you want to meet with Judge Beeler?

8 **MR. ENABNIT:** From Triad's perspective, I don't
9 think we have to do any depositions before we proceed with ADR.
10 That may be a minority opinion, but....

11 **THE COURT:** Well, I will give her a heads-up that it
12 is coming her way. I don't know if she has time, if she can
13 have it early discussion with you. Judge Beeler is very good
14 about keeping cases. So why don't I say 90 days, and then she
15 can ask me to continue that. I trust her judgment.

16 I will see you again, say, the late summer. So you
17 just check in. July 30th, is everybody going to be around?

18 **MS. LANDESS:** Sure. Why not?

19 **MR. ENABNIT:** Yes, your Honor.

20 **MS. LANDESS:** That's fine, your Honor.

21 **MS. WIDEN:** Yes, your Honor.

22 **THE COURT:** Any vacation plans?

23 **MR. KESSLER:** We might have a problem here.

24 **MS. deVRIES:** Would your Honor be comfortable if one
25 of plaintiff's counsel came, if there were scheduling issues?

1 **THE COURT:** That's fine, or I can -- I mean, this an
2 arbitrary date. I can move it a week, if that matters.

3 **MR. KESSLER:** How about the week of the 9th, your
4 Honor?

5 **THE COURT:** So it's on a Monday. Give me a proposal
6 for Monday.

7 **MS. deVRIES:** Did you say the 29th, your Honor,
8 July?

9 **THE COURT:** July 30th is the Monday.

10 **MS. LANDESS:** Your Honor, could we push that out one
11 week? I'm scheduled to start a trial in San Mateo County that
12 week, a fish fork (phonetic) trial.

13 **THE COURT:** August 6th.

14 **MR. ENABNIT:** Your Honor, the first half of August
15 is -- I'll be on vacation, very, very probably.

16 **MS. deVRIES:** Perhaps the last week of August, your
17 Honor?

18 **THE COURT:** August 27th?

19 **MR. ENABNIT:** Yes, your Honor.

20 **MS. deVRIES:** Yes, your Honor.

21 **MR. KESSLER:** That's fine.

22 **THE COURT:** All right, August 27th. Just a
23 reminder, our rules require that you file case management
24 statements. I do read them in advance, typically.

25 With you, I was primarily looking at the 12(b)(6).

1 So I want an update. If there's no reason to talk to you, then
2 I will take it off calendar and I'll issue an order saying that
3 I am taking it off calendar.

4 **MS. LANDESS:** A joint statement, your Honor?

5 **THE COURT:** Right. So local rules require, anytime
6 there's a case management conference, our rules require a joint
7 statement.

8 **MR. KESSLER:** And is this at 2:00 o'clock, as well?

9 **THE COURT:** 2:00 o'clock on Monday. Trial day goes
10 until 1:30, my standing calendars start at 2:00.

11 Okay, anything else?

12 **MR. ENABNIT:** Your Honor, Triad possesses foster
13 family records pertaining to both the plaintiff and his sister.
14 Some of the records there are probably subject to the
15 protections of an 827 petition.

16 Assuming that we can reach an appropriate
17 confidentiality proposal and order, then I would produce those
18 without the need of getting the approval of the Superior Court
19 judge in Alameda.

20 **MR. KESSLER:** Okay.

21 **MS. deVRIES:** Your Honor, on other cases I've
22 handled with foster children issues, like this one, we've had a
23 protective order from the Ninth Circuit, and that has been
24 sufficient for some defendants. I don't know if that gives you
25 have any pause to --

1 **MR. ENABNIT:** Yes.

2 **MS. deVRIES:** -- to consider that.

3 **THE COURT:** So if -- you know, I'm happy to enter
4 the protective order if that helps expedite matters, and so you
5 just --

6 **MS. deVRIES:** So the Model Ninth Circuit?

7 **MS. WIDEN:** Yeah, typically the model protective
8 order is what I'd like to submit, and then I find that once
9 that's been entered, if we then go to the juvenile court and
10 say we have a protective order already in place in the federal
11 litigation, that that usually helps to get what we need from
12 the --

13 **THE COURT:** Okay. So just get it to me. You use
14 the standard one. Just make sure that you change the discovery
15 portion of it to comply with my standing order. That's the
16 primary thing that people mess up, and they also tend to mess
17 up my name. So Gonzalez has two Zs and Rogers does not have a
18 D, and the combination of Gonzalez-Rogers is not Rodriguez.
19 Believe it or not. (Laughter.)

20 **MS. deVRIES:** I apologize for that, your Honor.
21 Thank you for telling me.

22 **THE COURT:** My clerk says that we are not complying
23 with the Federal Rules in terms of the minor. It may be
24 opposite the State rule.

25 **MS. WIDEN:** I think it does require initials,

1 actually.

2 **THE COURT:** So, according to 5.2, only a minor's
3 initials may be used. So from here on out, everything needs to
4 read J.P., and unless there is an objection, I will order the
5 transcript in this case to be revised, the name that has been
6 used, to J.P. Any objection?

7 **MR. KESSLER:** No.

8 **MS. deVRIES:** No, your Honor.

9 **MS. LANDESS:** No, your Honor.

10 **MS. WIDEN:** No objection. I would indicate that the
11 other minor that's his sister has also been referred to by her
12 first name, so maybe she should "M."

13 **MS. deVRIES:** Or M.M.

14 **THE COURT:** Okay, J.P., M.M., M.

15 **MR. KESSLER:** While I don't object to that, she is
16 deceased, and so I think the protections that the law affords
17 I don't think necessarily apply to her at this point.

18 **THE COURT:** I haven't researched it, but I -- you
19 know.

20 **MR. KESSLER:** Okay.

21 **THE COURT:** The other problem is the Complaint is in
22 violation.

23 **MS. deVRIES:** Your Honor, I'd be happy to file
24 either an amended complaint or a new version of the Complaint,
25 whatever your Honor would prefer.

1 **THE COURT:** So I am going to seal this one.
2 Everyone has it. It shall be sealed. It also violates it by
3 including his birth date. To the extent that if I deny the
4 motion, I will still instruct you to re-file the Complaint, in
5 compliance with 5.2.

6 **MS. deVRIES:** I apologize, your Honor. I'd be sure
7 to do that.

8 **THE COURT:** And make sure that if that's where
9 I come out, you don't use it as an opportunity to change
10 anything else.

11 **MR. KESSLER:** Nothing will change.

12 **THE COURT:** I'm saying that explicitly, because I've
13 had parties say, "Yeah, but we just clarified it," and then the
14 other side yells and screams because, you know, it's different.

15 **MR. KESSLER:** Right.

16 **THE COURT:** So let's make sure we're in compliance.

17 **MS. WIDEN:** Your Honor, the motion papers, I would
18 point out, also contain -- they kind of repeated what was in
19 the Complaint, so they also contained the minors' names. They
20 might --

21 **THE COURT:** All right, so --

22 **MS. WIDEN:** Both the motion, the opposition and the
23 reply brief.

24 **THE COURT:** All right, all of them are sealed. If
25 I grant the motion, you will have to re-file them in a redacted

1 manner, so that -- because this is a public proceeding.

2 **MS. LANDESS:** Unfortunately, your Honor, I think
3 everybody filed something with that name on it. I believe our
4 Answer just repeats the same caption. So I think we're all
5 going to have that issue --

6 **THE COURT:** But does your Answer do anything other
7 than have the caption?

8 **MS. LANDESS:** I apologize, I don't have it here with
9 me. I'm uncertain about that. We can certainly take a look at
10 it.

11 **MR. ENABNIT:** And on behalf of Triad, I just don't
12 remember off the top of my head.

13 **THE COURT:** So I see the decedent's name, and then
14 obviously, the caption. So what I would ask you to do is --
15 I will seal the Answers, as well.

16 What I'm going to ask you to do is go back and check
17 your documents, and send your revised version with a red line
18 to the other side, or to all parties, and try to get a
19 stipulation -- and then get a stipulation that says, you know,
20 the parties stipulate that the attached document can be filed.
21 Let me approve the stipulation, and then file the good one,
22 okay? But in the meantime, let's just seal the Answers, as
23 well --

24 **MS. WIDEN:** Thank you, your Honor.

25 **THE COURT:** -- so we can get it cleaned up, okay?

1 **MR. KESSLER:** Should we do that right away, or...?

2 **THE COURT:** We're going to seal them today. So
3 I would wait on the Complaint --

4 **MR. KESSLER:** Okay.

5 **THE COURT:** -- until I rule on the 12(b)(6).

6 **MR. KESSLER:** Okay.

7 **THE COURT:** The Answers, though, I think can be
8 dealt with.

9 **MS. LANDESS:** Thank you, your Honor.

10 **MS. WIDEN:** What about the motion papers?

11 **THE COURT:** I'm going to seal them all right now.
12 Let me deal with the motion to dismiss, and then I'll put what
13 to do in the order.

14 **MS. WIDEN:** Thank you, your Honor.

15 **THE COURT:** All right.

16 **MS. deVRIES:** Ms. Widen, are you going to be doing
17 the protective order?

18 **MS. WIDEN:** I can circulate it, sure.

19 **THE COURT:** Anything else to deal with today?

20 **MR. KESSLER:** No, I think we're good.

21 **THE COURT:** No?

22 **MR. ENABNIT:** Nothing.

23 **MS. LANDESS:** Thank you, your Honor.

24 **THE COURT:** Have a good day.

25 **MS. WIDEN:** Thank you.

MS. deVRIES: Thank you, your Honor.

3:58 p.m.

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CERTIFICATE OF REPORTER

I, LEO T. MANKIEWICZ, a pro tem reporter in the United States Court, Northern District of California, and Certified Shorthand Reporter duly licensed in the State of California, hereby certify that the foregoing proceedings in Case No. 4:17-cv-05679-YGR, J.P., et al. v. County of Alameda, et al., were reported by me, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

A handwritten signature in black ink, appearing to read "Leo T. Mankiewicz", is written over a horizontal line.

Leo T. Mankiewicz, CSR 5297, RMR, CRR

Wednesday, March 14, 2018